Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

Rosemary Smith; NORMA SMITH, Individually, and as Next Friend of AMANDA SMITH, an Infant; AUDREY M. SMITH; and GABRIELLE M. SMITH,
Petitioners

v.

HARRIS COUNTY; and TOMMY THOMAS, Harris County Sheriff,
Respondents

ON PETITION FOR WRIT OF CERTIORARE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. a.) Whether or not a policy of deliberate indifference, rising to an unconstitutional deprivation of medical care, is shown on the part of a County by evidence that a County jail inmate is allowed to deteriorate physically over a period of time, in an obvious fashion to a lay person, to a point of certain death, from an adverse and toxic reaction to a jail administered drug.

b.) If so, whether or not the Petitioners have shown sufficient such evidence to defeat the Respondents' *Motion for Summary Judgement.*

2. a.) Whether or not a policy of deliberate indifference, rising to an unconstitutional deprivation of medical care, is shown on the part of a County by evidence that a County jail inmate is allowed to deteriorate physically over a period of time, and shows apparent symptoms of Isoniazid toxicity or adverse drug reaction generally, during that time, despite written policies for jail personnel to be observant for such symptoms and to promptly secure medical care if they appear.

b.) If so, whether or not the Petitioners have shown sufficient such evidence to defeat the Respondents' *Motion for Summary Judgement.*

3. a.) If la.) or 2a.) is found in favor of the Petitioners, whether or not deliberate indifference, rising to a constitutional violation, is shown on the part of the sheriff of the jail.

b.) If so, whether or not the Petitioners have shown sufficient such evidence to defeat the Respondents' *Motion for Summary Judgement.*

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the prior proceedings in the United States Court of Appeals for the Fifth Circuit.

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Petitioners respectfully pray that a Writ of Certiorari issue to review the *Judgement and Opinion* of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 6, 1999.

OPINIONS AND ORDERS BELOW

The October 6, 1999 *Opinion* of the Court of Appeals, whose judgement is herein sought to be reviewed, has not been reported, and a copy is provided in the separate *Appendix* to this *Petition.* The prior *Judgment and Opinion* of the United States District Court for the Southern District of Texas, has not been reported, and a copy is provided in the separate *Appendix* to this *Petition.*

JURISDICTION

The judgement of the Court of Appeals was entered on October 6, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l) (Law. Co-op. 1988).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution Amendment 5, cited as U.S. Const. amend. V, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment 8, U.S. Const. amend. VIII, which provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution Amendment 9, U.S. Const. amend. IX, which states "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Constitution Amendment 14, Section 1, U.S. Const. amend. XIV, § 1, which provides:

> Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Statute 42 U.S.C § 1983 (Law. Co-op. Supp. 1998), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 56(c), Fed. R. Civ. P. 56(c) (West 1998), which provides that

> Rule 56. SUMMARY JUDGMENT
>
> (c) Motion and Proceedings Thereon.
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact, and that the moving party is entitled to a judgment as a matter of law.

NOTE ON REFERENCES TO SUPPORTING DOCUMENTS

References are made to supporting documents, as part of the record on appeal, and are numbered accordingly.

STATEMENT OF THE CASE

This is an appeal from a summary judgement rendered against the Petitioners in the trial court. It a civil rights action, brought by all the legal heirs entitled to sue under the Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code Ann. § 71.001 *et seq.* (West 1997), alleging a violation by the Respondents of the civil rights of Otha Audrey Smith under 42 U.S. C. § 1983 (Law. Co-op. Supp. 1998), with a deprivation under color of state law of rights, privileges and immunities of the Fifth, Eighth, Ninth and Fourteenth U.S. Constitutional Amendments, causing his wrongful death. The basis of the action is a failure of the Respondents to provide Mr. Smith, while a Harris County Jail inmate, adequate medical care. Petitioners requested damages based on Mr. Smith's pain and suffering, his loss of earning capacity and lost earnings, their loss of Mr. Smith's affection and companionship, their loss of Mr. Smith's pecuniary support, their loss of inheritance from Mr. Smith, exemplary damages, attorney's fees, pre- and post-judgement interest, and costs of suit.

Otha Audrey Smith was born on February 18, 1954, and was usually employed as a machine operator in the petroleum industry before being arrested and taken to the Harris County Jail on October 2, 1996. Doc. 25, Exhs. A-C, 17-23. Rosemary Smith was the mother of Otha Audrey Smith, and his father was deceased at the time of his death on February 17, 1997. *Id.* Otha Audrey Smith was married to Norma Smith at the time of his death, and their children are Amanda Smith, Audrey M. Smith, and Gabrielle M. Smith. *Id.*

Mr. Smith was arrested and taken to the Harris County Jail on a motion to revoke parole on October 2, 1996. Doc. 21, Exh. C. He was relatively healthy, had no history of liver disease, and showed no sign of illness at that time. Doc. 25, Exhs. B, C; Doc. 21, Exh. E.

Tuberculosis screening for inmates is required if an inmate "will probably be confined ... more than seven days" and "the inmate meets the screening guidelines prescribed by [the Texas Department of Health] board [rules]". Tex. Health & Safety Code § 89.051(a) (Vernon 1998). Additionally, Number J35 of the Harris County Sheriff's

Department, Manual of Policies and Procedures for Health Services provides for a health assessment to be completed within 14 days of an inmate's arrival at the jail, that will include "inquiry of tuberculosis" and "laboratory and/or other diagnostic tests" to detect communicable diseases. Doc. 22, Exh. N. Policy Number J85 requires that all inmates have a chest x-ray upon intake, and that a PPD skin test is required for inmates having close contacts with known or suspected cases of tuberculosis, those exhibiting symptoms of the disease, some inmates monitored by the HIV clinic, and those refusing a chest x-ray or electing to take the PPD test instead. *Id.*

Otha Audrey Smith's chest x-ray showed no evidence of tuberculosis, and there were no findings that he was a close contact of a recently diagnosed case of tuberculosis or had HIV infection. Doc. 21, Exh. E. However, he was administered a PPD skin test on October 18, 1996, intended as part of his 14 day health assessment; no reason was given for this in the Harris County Sheriff s Department Medical Records. *Id.* The test resulted positive, and was a "a significant reaction" according to Number J85 of the Harris

County Sheriff's Department, Manual of Policies and Procedures. Doc. 22, Exh. N. Additionally, this was classified as a "New Case, with MTB infection, no disease", and "preventive therapy" was prescribed. Doc. 21, Exh. E. Despite complaints of stomach problems on October 2, 1996, on admission into the Harris County Jail, Mr. Smith was not given a liver function test to determine whether or not he had a pre-existing liver disease. *Id.* The Harris County Sheriff's Department's medical records do not show whether or not, or how, a determination was made that he did not have a pre-existing liver disease. *Id.*

The Harris County Sheriff's Department, Manual of Policies and Procedures, Number J85 states that preventive therapy, including Isoniazid administration, for six months is indicated for "close contacts of a recently diagnosed case of tuberculosis with PPD skin test reaction of 5 mm or more", that it is to be determined if the inmate has "active liver disease", and that a "screening liver function test [is to be performed] only if indicated by [an inmate's] history". Doc. 22, Exh. N. The Manual also provides at Policy and Procedure Number J85 that inmates receiving Isoniazid are to

be advised that a small number of them may develop side effects. *Id.*

Some healthy individuals may have an adverse reaction to the drug Isoniazid. Doc. 25, Exh. D; Doc. 22, Exh. N, Pol. & Proc. No. J85. In an individual susceptible to an adverse reaction to the drug Isoniazid, Isoniazid administration is toxic to the liver, Doc. 25, Exh. D; Doc. 22, Exh. N, Pol. & Proc. No. J85, and fatal over a period of time, even to a healthy liver, Doc. 25, Exh. D. Isoniazid toxicity causing death develops over a period of time, and damage to the liver gradually increases until death results. Doc. 25, Exh. D. Outward symptoms of Isoniazid toxicity develop over a period of time, and gradually increase in severity until death. *Id.*

On October 22, 1996, while in the Harris County, Jail, Mr. Smith was required to take the drug Isoniazid. Doc. 21, Exh. E. There is no indication in his medical records from the Harris County Jail that he was given the required warning about the possible side effects of Isoniazid. *Id.* Harris County Sheriff s Department, Manual of Policies and Procedures Number J74, 2.2, 2.3, provides:

> All medication nurses, as well as floor deputies, must be made aware of the potential adverse reactions to medications. In all circumstances, any inmate thought to be experiencing a reaction will be brought to the clinic immediately.
>
> Adverse reactions will be defined as any significant, insignificant, negative, or undesirable response to a medication given to alleviate a specific illness and/or disease.

Doc. 22, Exh. N.

During a period from October 22, 1996, when he was taking the drug Isoniazid, Mr. Smith made repeated requests for medical attention to the jailers of the Harris County Jail. Doc. 25, Exh. B, Exh. C. During that time, Otha Audrey Smith's cellmate made repeated requests for medical attention for Mr. Smith to the jailers of the Harris County Jail. *Id.* According to the Harris County Sheriff's Department, Manual of Policies and Procedures Number J32, "Oral communication to medical personnel or to the jailers on the floor for medical needs is [in addition to a written request] acceptable", and it is also proper for an inmate to request medical care in behalf of another prisoner. Doc. 22, Exh. N.

During the period when he was taking the drug Isoniazid at the Harris County Jail, his mother Rosemary Smith spoke with him, and he told her that he was ill. Doc. 25, Exh. B, Exh. C. Ms. Smith also spoke with his cellmate, and the cellmate told her that Mr. Smith was ill. *Id.* In January of 1997, Otha Audrey Smith's daughter Audrey Smith visited him at the Harris County Jail, and she found him to be stooped over, having difficulty walking, having difficulty talking, with yellowed eyes, and appearing extremely ill. *Id.*

During the period when he was taking the drug Isoniazid at the Harris County Jail, Otha Audrey Smith was never given a test for liver function. Doc. 22, Exh. N.

According to the Texas Commission on Jail Standards, Minimum Jail Standards, Supervision of Inmates, Chapter 275.1 (1996), "Facilities shall have an established procedure for visual, face-to-face observation of all inmates by corrections officers at least once every hour." Doc. 25, Exh. E. "[Outward] side effects of nausea, vomiting, yellow eyes or dark urine [from Isoniazid administration at the Harris County Jail] are to be watched for and reported to the nursing staff." Doc. 22, Exh. N, Pol. & Proc. No. J85.

According to the Harris County Sheriff's Department, Medical Division, Comprehensive Medical Plan, Health Services, P 3.18, 3.16 C:

> [Harris County Jail] deputies are to remain alert to inmates who may appear to be physically ill or injured but have not registered a medical complaint. Deputies shall have the obligation to refer medical personnel to such inmates during their next conducted sick call or to follow emergency procedures if the observed illness or injury so justifies.

Doc. 25, Exh. F.

On January 24, 1997, Otha Audrey Smith's regimen of Isoniazid administration was ordered to be continued for another 90 days. Doc. 21, Exh. E. The Harris County Sheriff's Department medical records show that he was seen in the medical clinic on January 25, 1997, where his complaint is shown as "abdomen discomfort for several days". *Id.* He was given Maalox and told to request another clinic visit if his discomfort increased. *Id.* The medical records show Mr. Smith's complaint, as ulcers, and request for a physician on January 30, 1997. Doc. 21, Exh. F. He was not seen by a physician until February 4, 1997, and complained of having been sick for three weeks, with post-prandial nausea and

vomiting, jaundice, and coffee/tea colored urine. Doc. 21, Exh. E, Exh. I. On February 7, 1997, Mr. Smith's urinalysis was reviewed, and, for the first time, Isoniazid administration was suspended. Doc. 21, Exh. E.

The Harris County Sheriff's Department medical records show Otha Audrey Smith's complaint of memory loss, and post-prandial nausea and vomiting for the week before, on February 8, 1997, and a yellow eye color. Doc. 21, Exh. E. The records also show that he came back to the clinic on February 9, 1997, and made complaints of nausea and vomiting, for which he was given Maalox. Doc. 21, Exh. E, Exh. I. It is recorded in the medical records for February 10, 1997 that Mr. Smith was found in his cell lying down with his mouth open, and eyes watery, with jerky movements, no response to verbal commands, and that he had an "altered mental state". *Id.* The doctor noted that he appeared jaundiced, and speculated that Mr. Smith had hepatic encephalopathy with perhaps Isoniazid involvement, and that he would arrange for his transfer to the LBJ Hospital. *Id.*

At the time that Isoniazid administration was discontinued, on February 4, 1997, in all reasonable medical probability, Otha Audrey Smith was inevitably near death. Doc. 25, Exh. D. At the

time that Isoniazid toxicity was first suspected, on February 8, 1997, in all reasonable medical probability, he was inevitably near death. Doc. 25, Exh. D.

Otha Audrey Smith was taken to the LBJ Hospital, and died there on February 17, 1997. Doc. 25, Exh. A; Doc. 21, Exh. E, Exh. G. He died of extensive hepatocyte necrosis, and bridging fibrosis with marked atrophy and cholestasis, with multi-organ failure. Doc. 25, Exh. A, Exh. G. In laymen's terms, Otha Audrey Smith died of Isoniazid toxicity. Doc. 25, Exh. D.

In all reasonable medical probability, during the period when Otha Audrey Smith was taking the drug Isoniazid, and well before his death, Otha Audrey Smith exhibited outward signs of Isoniazid toxicity. Doc 25, Exh. D. Corrections officers, jail deputies, and other personnel should have been alert for symptoms of Isoniazid toxicity, and recognized these signs, according to the Harris County Sheriff's Department, Manual of Policies and Procedures Number J74, 2.2, 2.3; Doc. 22, Exh. N, or, at the very least, should have been watchful for inmates exhibiting signs of illness, and recognized the signs, according to the Texas Commission on Jail Standards, Minimum Jail Standards, Supervision of Inmates, Chapter 275.1 (1996);

Doc. 25, Exh. E, and the Harris County Sheriff's Department, Policy and Procedure Number J85; Doc. 22, Exh. N., and should have sought medical assistance. Diagnostic testing, in all reasonable medical probability, would have disclosed Isoniazid toxicity. Doc. 25, Exh. D.

In all reasonable medical probability, if Otha Audrey Smith would have received reasonable, and adequate medical attention at the first outward symptoms of Isoniazid toxicity, Isoniazid toxicity would have been determined. *Id.* In all reasonable medical probability, if Isoniazid toxicity would have been determined at that time, the drug could have been discontinued, and he would not have died from Isoniazid toxicity from Isoniazid administered at the Harris County Jail. *Id.*

The Respondents were deficient in providing necessary monitoring of Otha Audrey Smith, according to the requirements of the Harris County Sheriff's Department, Health Services Policy and Procedure Number J85, and, according to the standard of medical care in Houston, Harris County, Texas, Doc. 25, Exh. D.

On August 3, 1998, the Respondents filed a *Motion for Summary Judgement* on the Petitioners' whole case. In this *Motion,* the Respondent maintained that Petitioners lack standing to sue under the Texas Wrongful Death Statute, Texas Civil Practice and Remedies Code Section 71.001 *et seq.* (West 1997), and that there is no evidence that Tommy Thomas, Harris County Sheriff, was personally involved or adopted and implemented policies with a deliberate indifference to the medical needs of Otha Audrey Smith, that there was no policy or practice of training or supervision of Harris County that showed such deliberate indifference, although perhaps individual acts of negligence, that the case does not fall within the Texas Tort Claims Act, Section 101.001 *et seq.* of the Texas Civil Practice and Remedies Code (West 1997), and that Sheriff Thomas is shielded by qualified immunity in that his conduct was not objectively unreasonable, and by official immunity in that he acted in good faith and was within the scope of his discretionary duties.

The Petitioners filed a motion also on August 3, 1998, to compel the Respondents' further answers to interrogatories

on the ground that Petitioners had requested the names, addresses, and telephone numbers of Otha Audrey Smith's cellmates during his confinement, which was not provided. Doc. 23.

On September 8, 1998, the trial court granted the Respondents' *Motion for Sununary Judgement,* on the grounds that Petitioners did not show that anyone subjectively knew that Otha Audrey Smith was suffering from Isoniazid toxicity or that the Sheriff Tommy Thomas had been aware of the risk. That court wrote:

> Thus, although a risk of harm existed, no one subjectively knew that the deceased was suffering from Isoniazid toxicity. Although perhaps someone should have had the insight to infer that toxicity was occurring, there is insufficient evidence to subjectively find that the County deemed the risk substantial.
>
> Similarly, there is no basis for a finding that [Sheriff] Thomas was exposed to information concerning the immediate risk, and therefore, subjective culpability again has not been demonstrated.

Memorandum Opinion and Order, Doc. 28, 5 (citations omitted). The court entered a final judgement, closing the

case, and denied as moot the Petitioners' motion to compel further interrogatory answers. Doc. 28.

On September 17, 1998, following referral to a magistrate, Doc. 27, the Petitioners' motion to compel the Respondents' further answers to interrogatories was also denied. Doc. 33.

The Petitioners filed their notice of appeal to the U.S. Court of Appeals for the Fifth Circuit on October 2, 1998. Doc. 34. In its decision, the Fifth Circuit Court of Appeals affirmed the trial court, and wrote:

> The Smiths offered no evidence that Sheriff Thomas had subjective knowledge that Mr. Smith was having a reaction to the [Isoniazid] he was being given or that this reaction was potentially deadly. As such, the Smiths have presented no genuine issue of material fact indicating that Sheriff Thomas violated Mr. Smith's constitutional rights.

Further:

> Because the guards and physicians at the Harris County Jail are "non-policy-making employees", Harris County cannot be held vicariously liable for their failure to recognize Mr. Smith's allegedly manifest symptoms of [Isoniazid] toxicity.
>
> Equally unavailing is the Plaintiff's claim that the defendants failed to supervise adequately the

> personnel of the Harris County Jail. The plaintiffs have offered no competent evidence that the guards at the Harris County Jail have a history of failing to provide necessary medical attention. In fact, the record shows that Mr. Smith's own behavior potentially delayed a diagnosis of [Isoniazid] toxicity. The record shows that Mr. Smith gave inconsistent descriptions of his illness to clinic personnel, failed to give a complete medical history upon incarceration, and deliberately failed to provide a urine sample when requested.

United States Court of Appeals for the Fifth Circuit, No. 98-20976, Summary Calendar, *Opinion,* 4, 5. That court did not address the affidavit of Dr. Michael A. Levine, M.D., Petitoners' expert witness, and analyzed the liability of Harris County through theories of *respondeat superior,* negligence, and inadequate supervision of employees. The Court did not discuss the Respondents' claim that the Petitioners lacked standing to sue. *Id.*

ARGUMENT

Deprivation of Constitutional Rights

As explained by the Fifth Circuit Court of Appeals, *Opinion,* 2, n. 1, Otha Audrey Smith was a pretrial detainee, *Hamilton v. Lyons,* 74 F.3d 99, 104-106 (5th Cir. 1997), and had constitutional rights stemming from the due process guarantees of the Fourteenth Amendment, *Downey v. Denton County,* 119 F.3d 381, 385 n.7 (5th Cir. 1997). These included the right to adequate medical care, *Hare v. City of Corinth,* 74 F.3d 633, 639 (5th Cir. 1996), which may not be contracted away, *West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250 (1988). Section 1983 liability is predicated where a policy, official or unofficial, is the basis for a violation of a plaintiff's rights under the Constitution or other laws. 42 U.S.C. § 1983 (Law. Co-op. Supp. 1998). A persistent, widespread practice which, though not officially promulgated, may be so common and well settled as to constitute a custom. *Esteves v. Brock,* 106 F.3d 674 (5th Cir. 1997).

The standard for liability is subjective deliberate indifference, the same as for Eighth Amendment prisoner cases, *Hare v. City of Corinth,* 74 F.3d at 643, as delineated in *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970 (1994). There, it is stated

that deliberate indifference "describes a state of mind more blameworthy than negligence", and "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." 511 U.S. at 835 (emphasis added). Further, "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* (emphasis added). And, "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." 511 U.S. at 842 (emphasis added). Finally, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* (emphasis added).

Acts of a final policymaker are imputed to a governmental body. *Colle v. Brazos County, Tex.*, 981 F.2d 237 (5th Cir. 1993). Finally, under Section 351.041 of the Texas Local Government Code (West 1988), "The sheriff of [Harris County] is the keeper of the county jail. The sheriff shall safely keep all prisoners committed to the jail..... [and] ... the sheriff shall exercise supervision and control over the jail."

Governmental officials may be individually liable for the conduct of subordinates under 42 U.S.C. § 1983 (Law. Co-op. Supp. 1998) where it is shown that they participate in an act or omission that causes deprivation of a plaintiff's constitutional or other legal rights, where the official acted with deliberate indifference or gross negligence regarding violation of the rights. *Callis v. Sellars,* 931 F. Supp. 504 (S.D. Tex. 1996). Qualified immunity is available for an individual defendant, if pled as an affirmative defense, unless the conduct was objectively not reasonable, according to the contemporary standards. *Southard v. Texas Board of Criminal Justice,* 114 F.2d 539 (5th Cir. 1997).

Otha Audrey Smith did not receive adequate medical care at the Harris County Jail, according to the community standard, and this was a violation of the Fourteenth Amendment of the United States Constitution. He was administered, and required to take, the drug Isoniazid because of a positive PPD skin test reaction, although he did not meet any of the other required criteria to receive the medication. Over a period of four months, his liver was gradually and

increasingly damaged, and finally destroyed by Isoniazid, which caused his death.

Outward symptoms of Isoniazid toxicity gradually appeared, increasing in severity. Harris County, and Sheriff Thomas, as the keeper of the jail, knew about and were responsible for the specific risk of Isoniazid toxicity, about a general risk of adverse reaction to medication, and about a general risk of illness where a medical complaint has not been filed, and that these risks were substantial, as shown by the Harris County Jail's written policies and procedures. Mr. Smith's symptoms were obvious. Petitioners presented the affidavit of Dr. Levine to support this. The symptoms occurred over a substantial period of time, and were ignored. It is not reasonable to expect that Mr. Smith should have diagnosed himself. He was allowed to deteriorate physically, until he passed out on the floor, his speech was incoherent and he could not respond to verbal commands. At that point, medical treatment, and discontinuance of the drug Isoniazid was unavailing.

This was not the failure of a few employees. Mr. Smith came into contact with innumerable Harris County

employees and other personnel working for the Sheriff's Department, and was to have been observed every hour, according to the Texas Commission on Jail Standards, Minimum Standards. Despite awareness of the risks, there was a far reaching and widespread custom of ignoring the written policies.

There was a failure by Tommy Thomas, the Harris County Sheriff, directly, to implement the written policies, to make effective policies, and to reasonably discharge his duty to safely keep the inmates and exercise supervision and control over employees. A reasonable person would have implemented the written policies, in light of the risk of death from Isoniazid toxicity, other adverse medical reactions, and other undiagnosed illnesses, and would have supervised and trained Harris County Sheriff s Department personnel for compliance.

Summary Judgement Standard

Summary judgement, under Rule 56 of the Federal Rules of Civil Procedure, is proper only if no rational trier of fact could find for the non-moving party, and reasonable minds could not differ. *Resolution Trust Corp. v. Sharif-Munir-Davidson Development*

Corp., 992 F.2d 1398 (5th Cir. 1993). Additionally, summary judgement is appropriate only if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgement as a matter of law. *Federal Deposit Ins. Corp. v. Hamilton,* 939 F.2d 1255 (5th Cir. 1991).

Summary judgement against the Petitioners should not be granted in that, viewing the Parties' summary judgement evidence in a light most favorable to the Petitioners, there are genuine issues of material fact, reasonable minds could differ, and a rational trier of fact could find for the Petitioners. Petitioners show by the summary judgement evidence that Otha Audrey Smith's constitutional rights were violated and that there is a basis for a Section 1983 action.

It is not disputed that Otha Audrey Smith was required to take the drug Isoniazid when he entered the Harris County Jail on October 2, 1996. It is also undisputed that he died on February 17, 1997 of Isoniazid toxicity. It is also undisputed that Isoniazid toxicity was not considered, and the drug withdrawn, until he was inevitably near death. It is also undisputed that the Sheriff and Harris County, through the written policies, knew that there was a substantial risk of Isoniazid toxicity, and that these were not

followed. It is also undisputed that Mr. Smith exhibited obvious outward signs of Isoniazid toxicity, adverse drug reaction, and illness, gradually increasing until he passed out in his cell and was inevitably near death.

REASONS FOR GRANTING WRIT

Certiorari should be granted in that, under Supreme Court Rule 10(c) (West 1997), a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the U.S. Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the U.S. Supreme Court. The Fifth Circuit Court of Appeals, by requiring that Sheriff Thomas have had subjective knowledge that Mr. Smith was having a reaction to Isoniazid or that the reaction was deadly is in conflict with *Farmer,* 511 U.S. 825, 114 S.Ct. 1970 (1994), which provides that the standard for unconstitutionality is met by reckless disregard of a known risk, not subjective knowledge of harm or knowledge that harm will result. Sheriff Thomas and Harris County knew about the risks through the written policies and procedures, and Mr. Smith's outward signs of Isoniazid toxicity, adverse drug reaction,

and illness were obvious, displayed over a substantial period of time, and were ignored.

Finally, County jail deputies and jailers should be required, and encouraged, by statute, and by legal precedent, to make frequent and regular observation of the condition of their inmates and take quick responsive measures to secure medical treatment if necessary, particularly where there are written policies to this effect, and sheriffs should be required to implement and develop effective policies in this regard.

CONCLUSION

WHEREFORE, the Petitioners Rosemary Smith; Norma Smith, Individually, and as Next Friend of Amanda Smith, an Infant; Audrey M. Smith; and Gabrielle M. Smith pray that a Writ of Certiorari issue from this Honorable Court to review the judgement of the United States Court of Appeals for the Fifth Circuit in this case. In the event that the *Petition is* granted, Petitioners pray that the judgement of the court below be reversed,

and that this cause be remanded for trial.

Dated December 30, 1999.

Respectfully submitted,

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APPENDIX

Trial Court's *Final Summary Judgement* a - 1

Trial Court's *Memorandum Opinion and Order* a - 3

Court of Appeals's *Opinion* a - 13

UNITED STATES DISRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED SEP –9 1998
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROSEMARY SMITH; NORMA SMITH, Individually, and as Next Friend of AMANDA SMITH, an Infant; AUDREY M. SMITH; and GABRIELLE M. SMITH, Plaintiffs	}	
vs.	}	CIVIL ACTION NO. H-97-1956
HARRIS COUNTY; and TOMMY THOMAS, Harris County Sheriff, Defendants.	}	

FINAL SUMMARY JUDGMENT

In accordance with the Memorandum Opinion and Order of this same date, the Court hereby **ORDERS** that Defendants Harris County and Tommy Thomas are granted

summary judgment on all claims brought against them by Plaintiffs Rosemary Smith; Norma Smith, Individually, and as Next Friend of Amanda Smith, an Infant; Audrey M. Smith; and Gabrielle M. Smith. The Court further **ORDERS** that Plaintiffs take nothing by way of their suit and pay all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 8th day of September, 1998.

s/MELINDA HARNON
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED SEP –9 1998
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROSEMARY SMITH; NORMA SMITH, Individually, and as Next Friend of AMANDA SMITH an Infant; AUDREY M. SMITH; and GABRIELLE M. SMITH, Plaintiffs,	}	
vs.	}	CIVIL ACTION NO. H-97-1956
HARRIS COUNTY; and TOMMY THOMAS, Harris County Sheriff, Defendants.	}	

MEMORANDUM OPINION AND ORDER

Pending before the Court is: (1) Defendants Harris County and Tommy Thomas's Motion for Summary Judgment (Instrument #21); (2) Defendants' Motion to Strike Plaintiffs' Designation of Expert Witness (Instrument #24), and (3) Plaintiffs' Motion to Compel Further Responses to Interrogatories (Instrument #23).

Upon reviewing the record, Plaintiffs' Response (Instrument #25), and considering the applicable law, the Court concludes that the Motion for Summary Judgment should be **GRANTED**. The Court further concludes that Defendants' Motion to Strike Plaintiffs' Designation of Expert Witness and Plaintiffs' Motion to Compel Further Discovery Responses to Interrogatories should be **DENIED as MOOT.**

I. FACTUAL BACKGROUND

Beginning in October of 1996, Otha Smith was an inmate in the Harris County jail when his probation was revoked. Defendants' Motion for Summary Judgment ("MSJ"), Ex. "C." While in custody, Smith's skin test tested positive for tuberculosis. MSJ, Ex. "E." On October 22, 1996 Smith was prescribed Isoniazid and Pyridoxine to prevent the active form of the disease. MSJ, Ex. "E." Ninety days later, on January 24, 1997, Smith requested a renewal of his prescription. MSJ, Ex. "F."

The next day, Smith complained to a nurse about stomach ulcers. He claimed abdomen discomfort for several days and stated he was taking Pepcid. Smith was given

Maalox and directed to return to the clinic if he experienced increased discomfort. MSJ, Ex. "E," and "I".

Later that week, on January 30, 1997, Smith made another medical request. He again was complaining of stomach ulcers. Smith requested a follow-up appointment with a doctor. An appointment for February 4, 1997 was made for him. MSJ, Ex. "F".

At his appointment he stated he had been sick for three weeks and had experienced nausea and vomiting. At this time, Smith's Isoniazid treatment was ceased and a hepatitis test was given. On February 7, 1997, the hepatitis test results from the lab came back negative. MSJ, Ex. "E", and "I." The next day, Smith came back to the clinic complaining of memory loss. Later that day he was examined by a doctor That doctor determined that Smith's sickness must have been related to the Isoniazid treatment (that had since ceased). After a couple of later visits to the clinic, Smith was transported to LBJ hospital on February 10, 1997. MSJ, Ex. "F." Smith died on February 17, 1997.

The heirs of Smith have filed this civil rights lawsuit claiming Smith was denied his constitutional right to medical treatment.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. *Little* v. *Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant. *Latimer* v. *Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, however, the movant for summary judgment need not support

the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id; Little,* 37 F.3d at 1075.

Once the movant makes this showing the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,'" by 'conclusory allegations,' ... by unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 871-73, 110 S. Ct. 3177, 3180, 111 L. Ed. 2d 695 (1990*); Hopper v. Frank,* 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A.. Inc,* 14 F.3d 1082, 1086 (5th Cir, 1994)). Rather, the non- moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " " *Matsushita,* 475 U.S. at 587, 106 S. Ct. at 1356 (quoting FED. R. CIV. P. 56(e). In determining whether a

genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co*, 904 F.2d 290, 292 (5th Cir. 1990).

III. ANALYSIS

In Plaintiffs' Response to Defendants' Motion for Summary Judgement, the Plaintiffs allege the following factual disputes:

> 1. Whether or not requests were made for medical attention for Otha Audrey Smith, other than those appearing in the Defendants' records, that were ignored. If so, whether or not responsive medical care would have ameliorated his condition and averted his death from Isoniazid.
>
> 2. Whether or not Otha Audrey Smith exhibited outward signs of Isoniazid toxicity that should have alerted Harris County Sheriff's Department personnel to request medical attention. If so, whether or not responsive medical care would have averted his death from Isoniazid.

Defendants' Response, p. 12.

The constitutional rights of a convicted state prisoner spring from the Eighth Amendment's prohibition on cruel

and unusual punishment and, with a relatively limited reach, from substantive due process. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976); *Hare v. City of Corinth,* 74 F.3d 633, 649 (5th Cir. 1996) (citing *Estelle*). To prevail on their claim, Plaintiffs must demonstrate that prison officials acted or failed to act with deliberate indifference to his needs. *Estelle*, 429 U.S. at 104, 97 S. Ct. at 291 (reviewing convicted prisoner's inadequate medical care claim under deliberate indifference test); *Hare,* 74 F.3d at 649.

The U.S. Supreme Court defined the contours of this standard in *Farmer v. Brennan:*

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inherence could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*

Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (emphasis added).

In circumstances such as those presented by case *sub judice, Farmer* compels a district court to ensure "that the

requirement of subjective culpability is not lost." It is not enough merely to find "that a reasonable person would have known, or that the defendant should have known"[1] that a substantial risk of harm existed. *Id.* 511 U.S. at 843 n.8, 114 S. Ct. at 1982 n.8, 128 L. Ed. 2d at 829 n.8. *Farmer* noted that a prison official cannot be held liable if he merely knew of the underlying facts indicating possible danger, "but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.*, 511 U.S. at 843, 114 S. Ct. at 1982, 128 L. Ed. 2d at 829.

Thus, although a risk of harm existed, no one subjectively knew that the deceased was suffering from Isoniazid toxicity; *See Hare,* 74 F.3d at 649 (cautioning district courts that finding of liability for official's failure to respond reasonably would inappropriately render deliberate indifference standard akin to negligence). Although someone perhaps should have had the insight to infer that toxicity was occurring, there is insufficient evidence to subjectively find that the County deemed the risk substantial.

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[1] As delineated *supra*, Plaintiff's entire claim rest on the fact that the County and Thomas *should have known* of the Isoniazid toxity. *Farmer* counsels that this simply not enough.

Similarly, there is no basis for a finding that Thomas was exposed to information concerning the immediate risk, and therefore, subjective culpability again has not been demonstrated. *See Farmer,* 511 U.S. at 842-43, 114 S. Ct. at 1981-82, 128 L. Ed. 2d at 828-29. As stated in *Farmer,* "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." Id, 511 U, S. at 837, 114 S. Ct. at 1979, 128 L.Ed. 2d at 826. Therefore, Plaintiffs 'failure to provide medical care claims must fail.

The record before the Court[2] does not demonstrate that the defendants deprived the deceased of his constitutional right to prompt and adequate treatment for his injuries. Thus, the Court finds that Plaintiffs' claims lack merit regarding the medical care the deceased received.

Accordingly, the Court

ORDERS that:

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[2] The only evidence provided by Plaintiffs to the Court consist of affidavits wholly comprised of hearsay statements.

A. Defendants' Motion for Summary Judgment is **GRANTED**;

B. Defendants' Motion to Strike Expert and Defendants' Motion to Compel Further Interrogatories are **DENIED** as **MOOT.**

SIGNED at Houston, Texas, this 8th day of September, 1998.

s/MELINDA HARNON
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FILED OCT 06 1999
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20976
Summary Calendar

ROSEMARY SMITH ET AL.,

Plaintiffs,

ROSEMARY SMITH; NORMA SMITH; Individually and as Next Friend of Amanda Smith, an Infant; AUDREY M. SMITH; GABRIELLE M. SMITH,

Plaintiffs-Apelleants,

versus

HARRIS COUNTY;

TOMMY THOMAS, Harris County Sheriff,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-97-CV-1956

Before KING, Chief Judge, and HIGGINBOTHAM and STEWART, Circuit Judges.

PER CURIAM:[1]

Plaintiff-Appellants, the heirs of Otha Audrey Smith, appeal the district court's grant of summary judgment in favor of Defendants-Appellees, Harris County, Texas, and Sheriff Tommy Thomas. We AFFIRM.

Otha Smith died in 1997 while in the custody of the Harris County Jail. Mr. Smith had been arrested for violating his parole. Upon being taken into custody, Mr. Smith was given a full medical examination that included testing for tuberculosis (TB). Mr. Smith tested positive for TB. Pursuant to prison protocol, Mr. Smith was placed on a "preventive therapy" regime. This regime included taking the prescription drug Isoniazid (INH). Approximately five months after beginning INH treatment Mr. Smith experienced an extreme adverse reaction to the drug. Even though prison doctors promptly took Mr. Smith off INH, Mr.

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[1] Pursuant to 5TH CIR. R. 47.5., the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Smith's reaction to INH caused his liver to fail and eventually led to his death.

Mr. Smith's heirs filed this action under 42 U.S.C. § 1983, asserting that Sheriff Thomas and Harris County caused Mr. Smith's death by failing to detect and diagnose his toxic reaction to INH in time to save his life. The Smiths further contend that the Defendants-Appellees' failure to adequately train and supervise Harris County Jail personnel caused Mr. Smith's death from INH toxicity.

This court reviews a grant of summary judgment de novo, using the same standard applicable in the district court. Matagorda County v. Law, 19 F.3d 215, 217 (5th Cir. 1994). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmovant, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the nonmoving party to produce evidence of the existence of a genuine issue for trial. Little v. Liquid Air

Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or mere scintillas of evidence. Id.

Because Mr. Smith was awaiting a probation revocation hearing at the time of his death, his status is that of a pretrial detainee. See Hamilton v. Lyons, 74 F.3d 99, 104-06 (5th Cir. 1996).[2] If a jail officials episodic acts or omissions violate the constitutional rights of a pretrial detainee, the official is liable to the detainee only if the official's acts or omission constitute subjective deliberate indifference. Farmer v. Brennan, 511 U.S. 825 (1994). See also Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996). A prison official acts with deliberate indifference "only if he

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[2] Both parties analyze the Smiths' claims as though they arise under the Eighth Amendment. The Eighth Amendment, however, applies only to convicted prisoners. See Downey v. Denton County, 119 F.3d 381, 385 n. 7 (5th Cir.1997). Because Mr. Smith was I prison awaiting a probation detainee. See Hamilton v. Lyons, 74 F.3d 99, 104-06 (5th Cir. 1996). Therefore, the Smiths' claims flow from the Fourteenth, rather than the Eighth, Amendment. Regardless, the governing standard for deliberate indifference remains the same for both a pretrial detainee or a post-conviction prisoner. See Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996).

knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. at 847.

The district court did not err in granting summary judgment with regard to the claims against Sheriff Thomas. The Smiths offered no evidence that Sheriff Thomas had subjective knowledge that Mr. Smith was having a reaction to the INH he was being given or that this reaction was potentially deadly. As such, the Smiths have presented no genuine issue of fact indicating that Sheriff Thomas violated Mr. Smith's constitutional rights.

Similarly, to the extent that the plaintiffs assert that Harris County is liable because its employees failed to recognize that Mr. Smith was suffering from INH toxicity, their claim is unpersuasive. It is clearly established that "[a] [county] may not be held strictly liable for the acts of its non-policy-making employees under a respondeat superior theory." Colle v. Brazos County, 981 F.2d 237, 244 (5th Cir. 1993). Nor may it be held liable under § 1983 for mere negligence in oversight. See Rhyne v. Henderson County, 973 F.2d 386, 392 (5th Cir. 1992). Because the guards and

physicians at the Harris County Jail are "nonpolicy-making employees," Harris County cannot be held vicariously liable for their failure to recognize Mr. Smith's allegedly manifest symptoms of INH toxicity.

Equally unavailing is the plaintiffs' claim that the defendants failed to supervise adequately the personnel of the Harris County Jail. The plaintiffs have offered no competent evidence that the guards at the Harris County Jail have a history of failing to provide necessary medical attention. See Hinshaw v. Doffer, 785 F.2d 1260, 1263 (5th Cir. 1986). In fact, the record indicates that Mr. Smith's own behavior potentially delayed a diagnosis of INH toxicity. The record shows that Mr. Smith gave inconsistent descriptions of his illness to clinic personnel, failed to give a complete medical history upon incarceration, and deliberately failed to provide a urine sample when requested.

Furthermore, the record indicates that every time Mr. Smith requested medical attention he was seen by a prison nurse. There is no evidence, other than the uncorroborated affidavits of the Plaintiffs-Appellants, that Mr. Smith did not receive medical attention when requested. Additionally, Mr.

Smith did not admit to having, or begin to show, any symptoms of INH toxicity until February 4, 1997, four months after he began taking INH. The affidavits of Plaintiffs-Appellants Rosemary and Audrey Smith alleging that the jail failed to provide adequate medical treatment, standing alone, are insufficient to indicate deliberate indifference in the supervision of jail employees by Harris County Jail officials. These affidavits, therefore, fail to set forth the specific facts necessary to sustain a claim against Harris County or Sheriff Thomas as required by Fed. R. Civ. P. 56(e).

Lastly, the plaintiffs have failed to adequately brief their contention that the policies of the Harris County Jail governing the health, welfare, and supervision of inmates are inadequate. Accordingly, this issue has been abandoned on appeal. See Yohey v.Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

For the foregoing reasons the district court's grant of summary judgment in favor of the Defendants-Appellees is AFFIRMED.